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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98
	)	
Intercarrier Compensation for ISP-Bound Traffic	))	CC Docket No. 99-68

REPLY OF FOCAL COMMUNICATIONS CORPORATION, PAC-WEST TELECOMM, INC., AND US LEC CORP. TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION OR CLARIFICATION

Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp. (sometimes referred to collectively as "Joint Commenters"), by their undersigned attorneys, hereby reply to the Oppositions of Sprint Corporation and Verizon to Petitions for Reconsideration in this proceeding. Sprint mischaracterizes the operation of the Commission's new compensation regime for traffic to Internet service providers. Verizon is wrong in stating that the Commission's ban on intercarrier compensation to CLECs serving ISPs in new markets was a sound decision.

I. SPRINT HAS MISCHARACTERIZED THE OPERATION OF THE FEDERAL INTERCARRIER COMPENSATION RULE

Focal, Pac-West, and US LEC largely agree with Sprint's Opposition to the Petitions for Reconsideration in this proceeding. The Commission should not alter the "mirroring" provisions in the *ISP Traffic Order*[1] as they apply to incumbent local exchange carriers. The Joint

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-

Commenters do take exception, however, with this characterization by Sprint of the new federal intercarrier compensation regime:

> As Sprint reads the Commission's decision, the ISP rates apply only if an ILEC offers to *exchange* all traffic subject to section 251(b)(5) at [the relevant federal terminating compensation] rates. By specifically using the term 'exchange,' the Commission clearly envisioned a reciprocal relationship between ILECs and CLECs (or CMRS carriers) for purposes of compensation. . . . It is clear from this context that the Commission intended compensation parity between ILECs and CLECs . . . Because the compensation scheme adopted by the Commission applies equally to the termination of local voice traffic on either an ILEC or CLEC's network, the Commission clearly intended that CLECs be subject to the same rates as ILECs for terminating traffic.

Sprint Opposition at 4.

That is not what the *Order* provides. Focal, Pac-West, and US LEC agree with Sprint that if the ILEC does not adopt the federal plan, then all traffic – section 251(b)(5) traffic and so-called "information access" traffic – is compensated at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. The Joint Commenters also agree with Sprint that if the ILEC does adopt the federal plan and offers to exchange all section 251(b)(5) traffic at the federal capped rates, and the CLEC follows the lead of the ILEC and bills the ILEC at the same rates,[2] then all traffic – section 251(b)(5) traffic and "information access" traffic – is compensated at the applicable federal capped rate. In these two situations, Sprint is correct that the compensation rates between ILECs and CLECs are the same.

The difference between the understanding of Sprint and the understanding of the Joint Commenters occurs when the ILEC adopts the federal plan and states that it will terminate

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131 (rel. Apr. 27, 2001) ("*ISP Traffic Order*" or the "*Order*").

[2] The "offer" made by the ILEC described in paragraph 89 is not an offer in the traditional sense of offer-and-acceptance. Instead, it is more like an "announcement" that the ILEC will follow the requirements of the federal intercarrier compensation regime. The CLEC may altruistically agree to pay the ILEC the state-approved rate for traffic below 3:1, but that is not required by the *Order*. Similarly, the CLEC may decide to follow the lead of the ILEC and reduce its own reciprocal compensation rate to the federal capped rate. That is not required by the *Order* either.

section 251(b)(5) traffic at the federal capped rates, and the CLEC decides not to follow the example of the ILEC. In that situation, the compensation rates for section 251(b)(5) traffic (i.e., all traffic within the 3:1 exchange ratio) are not symmetrical between the ILEC and the CLEC. The ILEC must compensate the CLEC at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts for this traffic, while the CLEC must compensate the ILEC at the applicable federal capped rate. By opting into the federal compensation regime, the ILEC is offering to terminate statewide all traffic at the federal capped rate in order to be able to pay all CLECs the lower federal rate (with the misguided growth cap and new market restrictions) for ISP-bound traffic. Being able to reduce its liability for terminating compensation for ISP-bound traffic is the benefit of offering to lower its own terminating rates for all traffic, including section 251(b)(5) and ISP-bound traffic. A CLEC does not have to make any offer regarding the federal compensation regime, and it has the option of declining to follow the lead of the ILEC by not offering to lower the rate at which the CLEC will terminate section 251(b)(5) traffic originated by another carrier.

Further, the *Order* has no provision for the ILEC ever to receive the state-approved reciprocal compensation rate for section 251(b)(5) traffic when it chooses to adopt the federal intercarrier compensation regime for ISP-bound traffic. The *Order* could not be clearer on this point. As the Commission stated, "This 'mirroring' rule ensures that incumbent LECs will pay the same rate for ISP-bound traffic that they receive for section 251(b)(5) traffic." *ISP Traffic Order* at ¶ 89. Thus, the "mirroring" does not refer to the rates paid between the ILEC and the CLEC for the same kind of traffic. Instead, "mirroring" means that the rate the ILEC receives for section 251(b)(5) traffic "mirrors" the rate the ILEC pays for ISP-bound traffic. The Commission carefully limited application of this mirroring rule to ILECs in order to remedy the unfairness of allowing ILECs to receive state-approved rates for terminating section 251(b)(5) traffic, while allowing them to pay the normally lower federal capped rates for ISP-bound traffic. *Id.* The *Order* provides for asymmetrical rates between the CLEC and the ILEC for the traffic within the 3:1 ratio, and Sprint is mistaken to read the *Order* any other way.[3]

II. VERIZON'S ARGUMENT SUPPORTS THE POSITION OF THE JOINT COMMENTERS ON THE REASONABLE EXPECTATIONS OF NEW MARKET ENTRANTS

Verizon opposes the request of Wireless World LLC in its Petition for Reconsideration that the Commission reconsider the ban on intercarrier compensation for ISP-bound traffic for carriers that had not exchanged traffic in a particular market prior to the effective date of the *Order*. Wireless World proposes that the Commission rule that a carrier that requested an interconnection agreement with an ILEC on or before April 27, 2001 (the release date of the *Order*) should not be prohibited from receiving compensation under the new federal plan for ISP-bound traffic exchanged after that date.

Verizon contends that the bright-line rule established by the Commission was drawn "in a reasonable place." Opposition of Verizon at 2. Verizon is wrong, and its own reasoning demonstrates that the Commission should instead adopt the position of the Joint Commenters on this issue. Verizon bases its position on this belief: "A carrier that was actually exchanging traffic under an approved interconnection agreement arguably had some right to rely on the assumption that the arrangement would continue for the life of that agreement." *Id.* Thus, Verizon recognizes that a reasonable expectation of terminating compensation for ISP-bound

[3] Sprint's characterization of the requirements imposed on ILECs by the *Order* amounts to an untimely Petition for Reconsideration. There is nothing in the record to support Sprint's view that the level of compensation paid to the ILEC for terminating section 251(b)(5) traffic varies depending upon the conduct of the CLEC.

traffic, evidenced in Verizon's example by performance under an approved interconnection agreement, justifies continued payment of compensation in some form. That is precisely the position of the Joint Commenters, but the Joint Commenters would not limit evidence of such a reasonable expectation to performance under an approved interconnection agreement. As the Joint Commenters explained in their Response, the Commission should recognize -- as Verizon has -- that CLECs may have had reasonable expectations of terminating compensation, in some form, when they committed valuable resources to entering a new market.

The fact that the CLEC may not have been exchanging traffic on the effective date of the *Order* does not prove that the CLEC did not have a reasonable expectation of compensation. The Joint Commenters assert that there can be no reasonable bright-line rule to determine whether a new market entrant is entitled to compensation for terminating ISP-bound traffic under the terms of the *Order*. Instead, the Joint Commenters submit that a carrier that has made an appreciable, irretrievable investment in serving a new market should be compensated for terminating ISP-bound traffic in that market after the effective date of the *Order*. *See* Comments of Joint Commenters at 3-4.[4] Verizon recognizes that certain CLECs may have had reasonable expectations of compensation for ISP-bound traffic; the Joint Commenters simply dispute Verizon's position over how that reasonable expectation should be determined.

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[4] As stated in the Joint Response, the Joint Commenters' proposal must be considered in connection with the growth cap imposed by the *Order* as well. If the new market restriction is modified but the growth ceiling is not, carriers that have not exchanged traffic in the first quarter of 2001 in a particular market would calculate growth using a baseline of zero. That has the same effect as a bar on intercarrier compensation for ISP-bound traffic in a new market. As proposed in the Joint Commenters Response to the Core-Tel Petition for Stay Pending Judicial Review, the Commission should delay implementation of the growth ceiling so that the base period will be the first quarter of 2002, rather than the first quarter of 2001. Joint Commenters Response at 7. If that proposal is not adopted, the Joint Commenters propose the baseline for calculating the growth ceiling should be the national average minutes of use per switch recorded by *all* CLECs (that have exchanged traffic for at least six months prior to 2001) during the first quarter of 2001. *Id.* The proposal described above is consistent with the Joint Commenters' earlier proposal that a "new" switch subject to the rule would be any switch deployed within one year prior to and one year after the effective date of the *Order*. *Id.*

III. CONCLUSION

As the Joint Commenters have argued previously,[5] there are numerous flaws in the *Order* that make the new federal compensation regime unworkable. The Commission should suspend operation of the "new market bar" and the "growth cap" provisions of the *Order* because they are discriminatory and anticompetitive, and will impede rather than promote local competition. If the Commission maintains the new market restrictions and growth cap provisions, it should revise them to reflect the reasonable expectations of CLECs entering new markets. The Commission should rule that carriers that have made an appreciable, irretrievable investment to serve a particular market as of the effective date of the *Order* are permitted to be compensated for termination of ISP-bound traffic as described in the Joint Commenters Response.

Respectfully submitted,

Michael W. Fleming

Richard M. Rindler
Michael W. Fleming
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

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Counsel for Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp.

[5] Joint Response; *Id.*

Certificate of Service

I, Carolyn W. Shaw, hereby certify that on this 2nd day of August, 2001, the foregoing document was served by first class mail to the following **(except as indicated)**:

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By Courier)

Bryan Tramont
Senior Legal Advisor
Office of Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kyle Dixon
Legal Advisor
Office of Chairman Michael K. Power
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Paul Gallant
Senior Legal Advisor
Office of Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Senior Legal Advisor
Office of Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dorothy Attwood
Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jeffrey J. Carlisle
Senior Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Glen Reynolds
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Tamara Preiss
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey
Chief Policy and Program Planning
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Julie Veach
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jeremy Miller
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Daniel R. Shiman
Industry Economist
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jonathan Reel
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Office of Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jodie Donovan-May
Legal Advisor
Common Carrier Bureau
Policy Division
Federal Communication Commission
445 12th Street, S.W.
Washington, D.C. 20554

Janice Myles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

International Transcription Services
1231 20th Street, N.W.
Washington, D.C. 20036

Cynthia B. Miller, Esq.
Harold McLean, Esq.
Bureau of Intergovernmental Liaison
Florida Public Service Commission
Capital Circle Office Center
2540 Shuman Oak Boulevard
Tallahassee, FL 32399-0850

L. Marie Guillory, Esq.
Daniel Mitchell, Esq.
National Telephone Cooperative Association
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Steven E. Watkins, Esq.
Stephen G. Kraskin, Esq.
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Benjamin H. Dickens, Jr., Esq.
Gerald J. Duffy, Esq.
Mary J. Sisak, Esq.
Blooston, Mordkofsky, Dickens,
Duffy & Prendergast
2120 L Street, N.W., Suite 300
Washington, D.C. 20037

Lewis Stern
Vice President and Chief Financial Office
Wireless World LLC
19 Estate Thomas
St. Thomas, U.S.V.I. 00802

Michael E. Glover
Edward Shakin
of Counsel
Verizon
1300 I Street, N.W.
Washington, D.C. 20005

Susan E. McNeil
H. Richard Juhnke
Sprint
401 9th Street, N.W., Suite 400
Washington, D.C. . 20004

Carol Ann Bischoff
Executive Vice President and General Counsel
Jonathan D. Lee
Vice President, Regulatory Affairs
Competitive Telecommunications Association
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Robert J. Aamoth
Jennifer M. Kashatus
Kelley Drye & Warren, LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Teresa K. Gaugler, Asst. General Counsel
Jonathan Askin, General Counsel
Association for Local Telecommunication Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006

Brad E. Mutschellenaus
Genevieve Morelli
Kelley Drye & Warren, LLP
1200 Nineteenth Street, N.W., 5th Floor
Washington, D.C. 20036

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1424 Sixteenth Street, N.W., Suite 105
Washington, D.C. 20006

Philip Verveer
Gunnar Halley
David Don
Willkie Farr & Gallagher
Three Lafayette Centre
155 21st Street
Washington, D.C. 20036

Michael F. Altschul
Senior Vice President, General Counsel
Cellular Telecommunications & Internet Association
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Brian T. O'Connor
Vice President, Legislative &
Regulatory Affairs, LLP
Robert A. Calaff
Corporate Counsel
Governmental & Regulatory Affairs
Voice Stream Wireless Corporation
401 9th Street, N.W., Suite 5540
Washington, D.C. 20004

Douglas G. Bonner
Elizabeth Dickerson
LeBoeuf, Lamb, Greene & MacRae
1875 Connecticut Avenue, N.W.
Washington, D.C. 20008

Jonathan Askin
ALTS
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006

W. Scott Randolph
Director - Regulatory Matters
Verizon Communications
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Gary R. Lytte
Interim President and CEO
Lawrence E. Sarjeant
Vice President & General Counsel
Legal and Regulatory Affairs
USTA
1401 H Street, N.W., Suite 600
Washington, D.C. 20005-2164

Daniel Mitchell
NTCA
4121 Wilson Boulevard Tenth Floor
Arlington, VA 22203-1801

Carolyn W. Shaw

Carolyn W. Shaw

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